RE LIM SZU ANG, EX P KEWANGAN UTAMA BHD

HIGH COURT SABAH & SARAWAK, MIRI
ABDUL AZIZ RAHIM JC
[BANKRUPTCY PROCEEDING NO: 29-175-2000 (MR)]
13 APRIL 2004

BANKRUPTCY: *Interest - Limitation - Whether interest claimed time barred - Bankruptcy notice claiming interest issued after expiry of limitation period - Article 44 of the Schedule to the Sarawak Limitation Ordinance (Cap 49) - Whether contravened - Whether bankruptcy notice invalid - Creditor's petition - Whether bad in law*

BANKRUPTCY: *Notice - Validity of notice - Claim for interest from judgment debtor - Bankruptcy notice issued after expiry of limitation period - Whether issued out of time - Article 44 of the Schedule to the Sarawak Limitation Ordinance (Cap 49) - Whether contravened - Whether notice invalid - Presentation of creditor's petition pre-empted by issuance of bankruptcy notice - Whether creditor's petition also bad in law*

LIMITATION: *Interest - Claim for - Whether interest claim time barred - Whether bankruptcy notice issued out of time - Article 44 of the Schedule to the Sarawak Limitation Ordinance (Cap 49)*

CIVIL PROCEDURE: *Interest - Judgment debt - Whether interest claimed time barred - Bankruptcy notice claiming interest issued after expiry of limitation period - Whether notice issued out of time - Article 44 of the Schedule to the Sarawak Limitation Ordinance (Cap 49) - Whether contravened*

BANKRUPTCY: *Proceedings - Commencement of - Whether an enforcement of a judgment or order - Rules of the High Court 1980, O. 45 r. 1(1)*

This was an appeal against the decision of the senior assistant registrar dismissing the defendant/judgment debtor's ('the judgment debtor') application to set aside the bankruptcy notice and creditor's petition issued by the plaintiff/judgment creditor ('judgment creditor'). The background facts were that the judgment creditor entered a consent order dated 10 October 1995 against the judgment debtor for two principal sums of RM19,490.89 and RM43,700 plus interest and costs. The interest on the judgment sums was awarded at 8% per annum effective from 19 November 1994. As a result of the judgment debtor's failure to satisfy the said judgment sums, the judgment creditor, five years later on 9 May 2000, took out a bankruptcy notice and served it on the judgment debtor. When the judgment debtor failed to comply with it, the judgment creditor presented a creditor's petition dated 17 November 2000 and served it

on the judgment debtor. In the said bankruptcy notice and creditor's petition, the judgment creditor claimed for the principal judgment sums and interest from the judgment debtor for the period from 19 November 1994, the date ordered in the consent order until 9 May 2000, the date of the bankruptcy notice. The issues that arose herein were (1) whether a bankruptcy proceeding is an enforcement of a judgment and (2) whether the interest claimed by the judgment creditor was time barred under art. 44 of the Schedule to the Sarawak Limitation Ordinance (Cap 49) ("the Sarawak Ordinance").

Held (allowing the appeal):

[1] Commencement of a bankruptcy proceeding is not an enforcement of a judgment or order. A bankruptcy proceeding is a proceeding that would eventually result in the issuing of adjudicating and receiving orders whereby the judgment debtor is required to account for his assets and liabilities to an official receiver or official assignee (now known as the Director General of Insolvency), as the case may be, for the purpose of satisfying all its creditors including the judgment creditor who has petitioned for the bankruptcy. Thus, the bankruptcy proceeding is an action on a judgment but not an enforcement of the judgment within the meaning of O. 45 r. 1(1) Rules of the High Court 1980. (p 27 d-f)

[2] Article 44 of the Schedule to the Sarawak Ordinance provides that a claim for money payable for interest upon money due from the defendant to the plaintiff must be made not later than three years from the date the interest becomes due. In this case, the period of three years for a claim on the interest on the judgment sum in the consent order runs from 9 October 1995, the date of the consent order, and expired on 8 October 1998. Here, the bankruptcy notice was issued on 9 May 2000, about one year and seven months after the expiry of the limitation period under art. 44 of the Sarawak Ordinance. Likewise, the creditor's petition was presented on 17 November 2000, two years and one month after the expiry of the limitation period under the same article. Thus, applying the Federal Court decision in *Ernest Cheong*, the bankruptcy notice was issued out of time under art. 44 of the Sarawak Ordinance and was therefore invalid. (pp 29 b-d & 30 d-e)

[3] A creditor is allowed to present a creditor's petition if a debtor has committed any act of bankruptcy specified under s. 3(1) of the Bankruptcy Act 1967. One of these acts of bankruptcy is the failure of the debtor to satisfy the bankruptcy notice issued against him by the creditor. Thus the presentation of the creditor's petition by a creditor is pre-empted by the

issuance of the bankruptcy notice. Therefore if the bankruptcy notice is invalid and bad in law, the creditor's petition that follows in consequence of it would also be bad in law. (p 30 e-f)

[Bankruptcy notice and creditor's petition set aside with costs]

Case(s) referred to:
Eon Finance Bhd v. Lee Shin Koon [1997] MLJU 34 ***(refd)***
Re Ali Hassan, ex p HSBC Bank Malaysia Bhd [2003] 2 CLJ 228 HC ***(refd)***
Re Yau Kin Mun, ex p Public Bank Bhd [1999] 3 CLJ 412 HC ***(refd)***
UMBC Bhd v. Earnest Cheong Yong Yin [2002] 2 CLJ 413 FC ***(refd)***

Legislation referred to:
Bankruptcy Act 1967, s. 3(1)(i)
Limitation Act 1953, s. 6(3)
Limitation Ordinance (Cap 49) (Sarawak), Sch art. 44, 94, 97, 98, 101
Rules of the High Court 1980, O. 45 r. 1(1)

For the debtor/appellant - Merlyn Toh; M/s Yi & Co
For the creditor/respondent - Dominic Lai; M/s Dominic Lai & Co

Reported by Suhainah Wahiduddin

JUDGMENT

Abdul Aziz Rahim JC:
This is the judgment debtor's appeal (encl. 44) against the senior assistant registrar's ("SAR") decision given on 14 July 2003 dismissing the judgment debtor's application (encl. 32) to set aside the bankruptcy notice and the creditor's petition.

The main ground for the judgment debtor's application in encl. 32 is that the bankruptcy notice and the creditor's petition by the judgment creditor are time barred because the judgment creditor is claiming arrears on interests well after the period of three (3) years after the interest became due; therefore the claim offends Article 44 of the Schedule to Sarawak Limitation Ordinance (Cap. 49). ("the Sarawak Ordinance").

To this argument on limitation the judgment creditor responded by arguing that Article 44 of the Schedule does not apply. Instead Article 98 of the Schedule to the Sarawak Ordinance applies because the judgment creditor may enforce judgment within 12 years.

Therefore there is only one issue to be decided in this appeal that is the issue of limitation. In relation to this it is the question of which Article to the Schedule of the Sarawak Ordinance applies – is it Article 44 or Article 98?

The background facts may be stated briefly as follows: The plaintiff (ie the judgment creditor) entered a consent order dated 10 October 1995 against the defendant (ie the judgment debtor) for two principal sums of RM19,490.89 and RM43,700 plus interest and costs. The interest on the judgment sums was awarded at 8% per annum effective from 19 November 1994. The defendant did not satisfy the judgment sums.

On 9 May 2000, that is about five years after the date of the consent order, the plaintiff took out a bankruptcy notice and served it on the defendant. When the defendant failed to comply with the bankruptcy notice, the plaintiff presented a creditor's petition dated 17 November 2000 and served it on the defendant.

In the bankruptcy notice and the creditor's petition, the judgment creditor (ie the plaintiff) is claiming for the principal judgment sums and interest. However the interest that the judgment creditor is claiming from the judgment debtor (ie the defendant) is for the period from 19 November 1994, the date ordered in the consent order until 9 May 2000, the date of the bankruptcy notice. The amount of interest for that period on the first judgment sum is RM7,928.52 and the amount for the same period on the second judgment sum is RM19,146.58.

The judgment debtor contends that the interest claim is time barred because it contravenes Article 44 of Sarawak Ordinance. The Article provides that a claim for money payable for interest upon money due from the defendant to the plaintiff must be made not later than three (3) years from the date the interest becomes due. It was argued on behalf of the defendant that since the consent order had ordered that the interest on the principal judgment sum is payable from 19 November 1994, the claim for interest by the judgment creditor in its bankruptcy notice dated 9 May 2000 and the creditor's petition dated 17 November 2000 is made outside the three year period allowable under Article 44 of the Schedule to the Sarawak Ordinance.

For the judgment creditor it was contended that the applicable provision in the Sarawak Ordinance is Article 98 of the Schedule to the Ordinance, not Article 44. Learned counsel for the judgment creditor, in his brief written submissions, argued that the judgment creditor is enforcing the judgment, obtained by the consent order by bankruptcy proceedings. Article 98 of the Schedule to the Sarawak Ordinance provides that the time limit for enforcement of a judgment obtained in Sarawak is twelve years from the date of the judgment. Therefore it was argued for the judgment creditor that the judgment creditor's bankruptcy notice and the creditor's petition are well within the time

period allowable because they were issued and presented on 9 May 2000 and 17 November 2000 respectively, before the expiry of the twelve years period. It was pointed out that since the consent order was obtained on 10 October 1995, the judgment creditor has until 9 October 2007, that the date of expiry of the twelve years period under Article 98, to commence bankruptcy proceedings against the judgment debtor.

In my view, the issues raised in the learned counsels' submissions are as follows: Firstly, is a bankruptcy proceeding an enforcement of a judgment for the purpose of Article 98 of the Schedule to the Ordinance. Secondly, if it is so, can the judgment creditor recover the interest on the judgment three years after the interest becomes due for the purpose of Article 44 of the Schedule to the Ordinance.

As to the first issue, O. 45 r. 1(1) RHC 1980 provides that a judgment or order of the payment of money, not being a judgment or order for payment of money into court, may be enforced by one or more of the methods specified under paras (a) to (e) of r. 1(1). It is obvious that a bankruptcy proceeding is not one of the methods specified. The consent order in this instant case is obviously a consent order or judgment for the payment of money. Therefore if the judgment creditor/plaintiff wanted to enforce the judgment or order in this instant case he must use one of the methods of enforcement as specified in O. 45 r. 1(1) RHC 1980. In the light of these provisions, it is my view that commencement of a bankruptcy proceeding is not an enforcement of a judgment or order. A bankruptcy proceeding is a proceeding that would eventually result in the issuing of adjudicating and receiving orders whereby the judgment debtor is required to account for his assets and liabilities to an official receiver or official assignee (now known as the Director General of Insolvency), as the case may be, for the purpose of satisfying all its creditors including the judgment creditor who has petitioned for the bankruptcy.

Thus in my view the bankruptcy proceeding is an action on a judgment but not an enforcement of the judgment within the meaning of O. 45 r. 1(1) RHC 1980. An action on a judgment is not the same as enforcing a judgment. In enforcing a judgment a party in whose favour the judgment is given is taking a proceeding against the adjudged party in order to force that other party to satisfy the terms of the judgment in accordance with the rules relating to the enforcement of judgments. But in an action on a judgment the party that obtained the judgment is not enforcing the judgment as understood under the rules. Instead the party concerned is exercising his rights arising from the judgment, and given to him under the rules or a written law, by a separate and distinct action or proceedings. However the outcome of such action or proceedings may result in the satisfaction of the judgment by the party against

whom the judgment is obtained. That being the case, the submissions by the learned counsel for the judgment creditor that Article 98 of the Ordinance does not prevent him from taking out the bankruptcy notice and subsequently presenting the creditor's petition against the judgment debtor is not entirely incorrect. I am of that view because Article 98 of the Sarawak Ordinance speaks about 'upon judgment obtained in Sarawak ...' This appears to include enforcement of judgment as well as action on a judgment. However having considered the provisions of the Sarawak Ordinance as a whole I am inclined to think that the more appropriate provision of the Sarawak Ordinance that is applicable to the judgment creditor is Article 97 which provides that the limitation period for any suit instituted for which no period of limitation is provided elsewhere in the Schedule to the Sarawak Ordinance the period of limitation is six years. The word 'suit' is defined in s. 2 of the Sarawak Ordinance as 'includes any action or proceedings'. To my mind the definition is non-exhaustive and the term 'proceedings' may and could include bankruptcy proceedings. If I am right here, the judgment creditor was still within time when he commenced the bankruptcy proceedings against the judgment debtor; because under Article 97 of the Sarawak Ordinance the judgment creditor had until 2001 to issue a bankruptcy notice and subsequently to file the creditor's petition.

But the judgment debtor's case is not that the judgment creditor is time barred under Article 97 or Article 98 of the Sarawak Ordinance. The judgment debtor's case is that the bankruptcy notice and the creditor's petition are caught by Article 44 of the Sarawak Ordinance because the judgment creditor has included the claim for payment of interest in the bankruptcy notice and the creditor's petition. The relevant question therefore is whether the interest claimed by the judgment creditor is time barred under Article 44 of the Sarawak Ordinance.

In *Re Yau Kin Mun; ex parte Public Bank Bhd.* [1999] 3 CLJ 412 Skinner JC (as he then was):

> the words 'from the date on which the interest became due' must refer to the date of judgment and not the date stated in the judgment from which interest became payable because interest in respect of a judgment debt does not become due until a judgment actually passed and entered. It is only from that date that the right to be paid interest on the judgment debt arises.

Although, the court then was dealing with s. 6(3), the second limb, of the Limitation Act 1953 that is applicable only to West Malaysia, the second limb of that section is in substance similar to the wordings in Article 44 of the Sarawak Ordinance, in that under the second limb to s. 6(3) Limitation Act 1953 a claim for interest is limited to a period of six years from the date the interest becomes due whereas in Article 44 of the Sarawak Ordinance the period is limited to three years. Thus in this case the period of three years for a claim on the interest on the judgment sum in the consent order runs from 9 October 1995, the date of the consent order, and expired on 8 October 1998. In the instant case the bankruptcy notice was issued on 9 May 2000, about one year and seven months after the expiry of the limitation period under Article 44 of the Sarawak Ordinance. Likewise, the creditor's petition was presented on 17 November 2000, about two years and one month after the expiry of the limitation period under the same Article.

In *UMBC Bhd v. Earnest Cheong Yong Yin* [2002] 2 CLJ 413 FC the appellant obtained judgment against the respondent on 15 October 1987 with interest awarded from 1 April 1986. On 24 January 1996 the appellant filed a bankruptcy notice against respondent for the principle sum and interest. The court answered the question on the construction of the second limb of s. 6(3) of the Limitation Act 1953, that the act of recovery of the arrears of interests in respect of the judgment debt must be made within six years of the judgment and only up to the date the act of recovery. The court also said that the date on which interest on judgment debt became due is the judgment date. In this regard the above passage quoted from the judgment in *Re Yau Kin Mun* case *(supra)* is a correct statement of the law. However the point canvassed in *Re Yau Kin Mun* regarding the issuance of a bankruptcy notice after the expiry of the six years period for the recovery of interest on a judgment but before the expiry of twelve years period limited for the enforcement of a judgment is no longer correct and should not be followed in the face of the Federal Court's decision in *Ernest Cheong* case *(supra).* The court in *Re Ali @ Abdul Aziz bin Hassan; ex parte HSBC Bank Malaysia Bhd* [2003] 2 CLJ 228 also did not follow *Re Yau Kin Mun (supra)* on the point. The court reasoned that *Ernest Cheong* case *(supra)* was binding on it on the principle of *stare decisis*. I am of the same view in that I am too bound by *Ernest Cheong*. However to be fair to the learned judge in *Re Yau Kin Mun*, it must be noted that *Ernest Cheong* was decided later in time but before *Re Ali (supra)*. Had *Ernest Cheong* been decided before the decision in *Re Yau Kin Mun*, the decision in the latter case could have been different on this very point.

In his brief written submissions, learned counsel for the judgment creditor argued that *Re Yau Kin Mun* and *Ernest Cheong* are not relevant and inapplicable to the instant case. He reasoned that the two cases dealt with s. 6(3) Limitation Act 1953 which is not applicable to Sarawak. The statute law on limitation that applies to Sarawak is the Sarawak Limitation Ordinance (Cap 49). Article 98 of the Sarawak Ordinance does not have the second limb similar to s. 6(3) Limitation Act 1953. Whilst it is true that Article 98 of the Sarawak Ordinance is not similarly worded as s. 6(3) of the Limitation Act 1953 and does not have an identical or similar second limb as in the section the observations by the court in *Re Yau Kin Mun* and *Ernest Cheong* on the interpretation of the section, particularly the second limb, is highly pertinent and relevant to the interpretation of Article 44 and Article 98 of the Sarawak Ordinance. In my view, having regard to the language of Article 44 and Article 98 of the Sarawak Ordinance, the two Articles are akin to the second and first limbs of s. 6(3) Limitation Act 1953 respectively.

On the facts of this instant case it is obvious that the bankruptcy notice dated 9 May 2000, which included the claim for interest, was issued three years after the period the interest became due. Thus applying the Federal Court decision in *Ernest Cheong* it is clear that the bankruptcy notice was issued out of time under Article 44 of the Sarawak Ordinance and therefore is invalid. A creditor is allowed to present a creditor's petition if a debtor has committed any act of bankruptcy specified under s. 3(1) of the Bankruptcy Act 1967. One of these acts of bankruptcy is the failure of the debtor to satisfy the bankruptcy notice issued against him by the creditor – see s. 3(1)(i) of the Bankruptcy Act 1967. Thus the presentation of the creditor's petition by a creditor is pre-empted by the issuance of the bankruptcy notice. Therefore if the bankruptcy notice is invalid and bad in law, the creditor's petition that follows in consequence of it would also be bad in law. This is so because the petition is pre-empted by an invalid bankruptcy notice.

Another argument advanced by the learned counsel for the judgment creditor is that Article 98 of the Sarawak Ordinance specifically covers limitation on the computation of the period for the enforcement of a judgment. Since the judgment creditor in this case is 'enforcing' the consent order dated 10 October 1995 then Article 44 of the Ordinance has no application because it relates only to a claim of interest. He cited the case of *Eon Finance Bhd v. Lee Shin Koon* [1997] MLJU 34 in which the learned Justice Tee Ah Sing dealt with the issue of limitation under the Sarawak Ordinance and held that where Article 94 of the Schedule to the Sarawak Ordinance specifically addressed the facts of the case, Article 97 became inapplicable. He submitted that similar situation arises in this instant case in that there is specific provision in Article 98 of the Schedule to the Sarawak Ordinance.

But *Eon Finance Bhd* is not a bankruptcy proceeding's case. It is a case in which the plaintiff was trying to recover a sum of RM306,519, interest and costs by a writ action. This sum is the shortfall of the total sum owed by the defendant to the plaintiff after taking into account the proceeds of a foreclosure proceeding that had taken place earlier. The issue before the court then is which limitation period in the Sarawak Ordinance is applicable in respect of the claim for the shortfall. Is it Article 101 of the Sarawak Ordinance which relates to the enforcement of payment of money charged upon immovable property; or is it Article 38 for money payable for money lent; or Article 40 for money lent under an agreement and payable on demand; or Article 93 for compensation for breach of contract not in writing and not specifically provided for in the Sarawak Ordinance; or Article 94 for compensation for breach of contract in writing or Article 98 for suit for which no limitation period of limitation is provided elsewhere in the Schedule to the Sarawak Ordinance. Plaintiff's counsel in *Eon Finance Bhd* case *(supra)* argued that Article 97 was applicable and not Article 40 because the shortfall was not money lent under an agreement and not payable on demand. He argued that Article 97 is a general limitation whereby the limitation period started to run from the time the right to sue accrues. The defendant's counsel in that case, on the other hand, contended that the plaintiff's claim was time barred under Article 38 read together with Article 94 or alternatively under Article 40 read together with the same Article 94. He argued that the loan in *Eon Finance Bhd* case was released earlier and the memorandum of charge that secured the loan was only executed one month later, after the release of the loan. Having heard the counsels, the learned judge in *Eon Finance Bhd* case *(supra)* concluded that the plaintiff's suit 'may be properly described as one for compensation for breach of contract under Article 94 of the Limitation Ordinance' (see p. 17 of the Law Report). Then, at the same page of the Law Report, the learned judge remarked as follows:

> Since the limitation period for the present suit has been provided for under Article 94, I am of the view that Article 97 is inapplicable, for Article 97 is only applicable in cases where suit for which no period of limitation is provided elsewhere in the Schedule.

It is quite obvious that the facts in *Eon* case *(supra)* are different from the instant case and that the learned judge in *Eon Finance Bhd* case had come to his conclusion as such, based on his specific finding as to the nature of the plaintiff's claim on the evidence before him. Furthermore, in this instant case, there is also a specific provision as to limitation period in relation to claim for interest namely Article 44 of the Sarawak Ordinance. Therefore in my view the plaintiff's reliance on *Eon Finance Bhd* case does not assist the plaintiff.

It is also my view that *Earnest Cheong* and *Re Ali* are the cases that are more relevant and pertinent on the point. These cases dealt with limitation period relating to bankruptcy proceedings. Though the provisions as to the period of limitation in the two cases are provisions under the Limitation Act 1953 that is only applicable to Peninsular Malaysia and not to Sarawak, the principles enunciated by these cases may be applied in interpreting substantially similar provisions of Article 44 of the Sarawak Ordinance.

Therefore on the foregoing reasons I allow the appeal by the judgment debtor to set aside the bankruptcy notice and the bankruptcy petition by the judgment creditor with costs. Costs to be taxed unless agreed.